

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1435

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

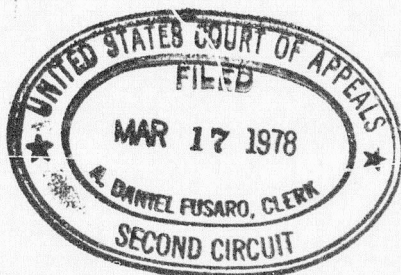
MILLICENT JONES and
LAVANNE ELAINE HAMMOND,

Defendants-Appellants.

Docket No. 77-1435
Docket No. 77-1496

BRIEF FOR APPELLANT
MILLICENT JONES

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



MARTIN ERDMANN,
THE LEGAL AID SOCIETY,
Attorney for Appellant
MILLICENT JONES
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

STEVEN LLOYD BARRETT,
Of Counsel.

B
P/S

CONTENTS

	<u>Page</u>
Table of Cases and Other Authorities Cited	i
Question Presented	1
Preliminary Statement	2
Statement of Facts	2
Argument	
IT WAS IMPROPER FOR THE COURT TO INSTRUCT THE JURY THAT CONSPIRACY PRESENTS A GREATER THREAT TO SOCIETY THAN THE CRIME OF AN IN- DIVIDUAL AND THAT THE ASSOCIATION FACILITATES MORE COMPLEX CRIMES, ENHANCES THE LIKELIHOOD OF SUCCESS, AND MAKES DETECTION MORE DIFFICULT	9
Conclusion	13

TABLE OF CASES

<u>United States v. Cassino</u> , 467 F.2d 610 (2d Cir. 1972), cert. denied, 410 U.S. 928 (1973)	12
<u>United States v. Cirillo</u> , 468 F.2d 1233 (2d Cir. 1972), cert. denied, 410 U.S. 989 (1973)	10
<u>United States v. Hill</u> , 417 F.2d 279 (5th Cir. 1969)	11
<u>United States v. Linn</u> , 438 F.2d 456 (10th Cir. 1971)	11
<u>United States v. Lozaw</u> , 427 F.2d 911 (2d Cir. 1970)	10
<u>United States v. Rabinowich</u> , 238 U.S. 78 (1915)	11
<u>United States v. Sperling</u> , 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 960 (1975)	10

OTHER AUTHORITIES CITED

E. Devitt and C. Blackmar, FEDERAL JURY PRACTICE AND IN- STRUCTIONS §27.04 (1977)	10
J. Dowsey, CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE IN NEW YORK 4-11-4-12 (1968)	10
R. Ford and A. Clements, TRIAL JUDGES MANUAL OF CHARGES (1968)	10
W. LaBuy, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES §§10.00, 17.02 (1965)	10
W. Mathes and E. Devitt, FEDERAL JURY PRACTICE AND IN- STRUCTIONS §§19.07, 25.04 (1965)	10

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

MILLICENT JONES and
LAVANNE ELAINE HAMMOND,

Defendants-Appellants.

Docket No. 77-1435
Docket No. 77-1496

BRIEF FOR APPELLANT
MILLICENT JONES

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

QUESTION PRESENTED

Whether it was improper for the court to instruct the jury that conspiracy presents a greater threat to society than the crime of an individual and that the association facilitates more complex crimes, enhances the likelihood of success, and makes detection more difficult.

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Constance Baker Motley) rendered November 15, 1977, after a jury trial, convicting appellant Millicent Jones of conspiracy to violate 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) under 21 U.S.C. §846. The court imposed a sentence of one year and one day in prison, suspended sentence, and placed appellant on probation for a term of 18 months.

By order of this Court dated November 29, 1977, The Legal Aid Society, Federal Defender Services Unit, was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

Appellant Millicent Jones and her co-defendant, Lavanne Elaine Hammond, were indicted in a single-count indictment* for conspiracy to violate 21 U.S.C. §§812, 841(a)(1), 841(b)(1)(A) under 21 U.S.C. §846. The conspiracy existed between January 1, 1977, and May 20, 1977, and entailed negotiations with undercover agents which were purportedly to culminate in a sale of heroin. The intended deal was for one-eighth of a kilogram of heroin (approximately four ounces), for \$7,000. No sale was

*The indictment is reproduced as B to the separate appendix to the brief of appellant Jones.

consummated, and neither defendant was ever found to be in possession of narcotics.*

On April 14, 1977, Agents Gerald Franciosa and Robert Palombo and a confidential informant named Connie met and planned an attempt to purchase drugs from Miss Jones (T.26- 7).** Connie placed several telephone calls to Miss Jones and arranged a meeting between Franciosa and Miss Jones (T.27). The three proceeded to 1372 Washington Avenue; Palombo remained in the car while Franciosa and Connie went upstairs to Miss Jones's apartment at about 7:00 p.m. (T.27-28, 247, 273).

Upstairs, Miss Jones advised Franciosa that the price was \$7,000 for an eighth of a kilogram of heroin. A woman named Elaine, identified as co-defendant Hammond and described by Miss Jones as her "connection," arrived shortly thereafter and discussed the sale with Franciosa (T.29-30). Miss Jones was suspicious (T.128-129), and Elaine was reluctant to speak with Franciosa (T.172) because he was white; Franciosa did not reach a firm agreement with Elaine, who told him that he would have

*Drug paraphernalia, notably quinine and glassine envelopes, were seized from a closet of a house in which co-defendant Hammond allegedly resided. The search and seizure which produced these items was challenged at a pre-trial hearing. However, appellant Jones had no possessory interest in the premises or the seized goods, and was not charged with a possessory crime. Her attorney conceded that she lacked standing to join in the challenge (see Hearing at 10, 12, 105). The drug paraphernalia, as well as papers seized from the co-defendant's purse, were held admissible against the co-defendant's challenge.

**Numerals in parentheses preceded by "T" refer to pages of the trial transcript.

to deliver the entire \$7,000 in cash before he would be permitted to examine his purchase. Franciosa expressed reservations and asked Elaine to have her husband, who was the source, speak to him (T.30-31). Elaine left the apartment and called half an hour later to advise Franciosa that her husband would not meet with him (T.34). In several subsequent telephone calls between Franciosa and Elaine's husband, Franciosa attempted to arrange some alternative procedure for the sale while Elaine's husband remained adamant in his demand for the delivery of the money (T.41-42).

Franciosa and Palombo returned to Miss Jones's apartment on April 15, 1977, at about 10:30 p.m. (T.43). Elaine's husband called soon after their arrival and asked Franciosa to count his money in front of Miss Jones; Palombo counted out only \$2,900, and when Elaine's husband inquired about the balance of the money, Franciosa indicated that he wanted only one ounce (T.44-45). The seller became annoyed, stated that the deal was all or nothing, and hung up (T.45). Franciosa later asked Miss Jones to arrange for a delivery of a sample of the heroin, but she was apparently unsuccessful (T.46). On April 18, 1977, Franciosa had another conversation with Miss Jones in which he attempted to arrange for a smaller sale and left the matter unresolved (T.47-48).

Franciosa called Miss Jones on April 26, 1977, to tell her that he would be prepared to provide the \$7,000 the next day (T.63). On April 27, Franciosa and Palombo arrived at

Miss Jones's apartment and displayed the full \$7,000 (T.63-64, 75-76). Elaine's husband, contacted by telephone, agreed to proceed with the sale (T.77). Miss Jones was sent downstairs with the money, while Franciosa and Palombo remained in her apartment with her children, but the sale was stalled again; this time, Elaine's husband was unable to deliver the drugs because he had noticed police watching his house (T.81). Elaine's husband left with the intention of obtaining heroin, but he soon alled back. Having noticed that he was being followed, he accused Miss Jones of setting him up (T.81-82). Although Elaine's husband later told Miss Jones that he might still sell the heroin to Franciosa, he indicated that the sale as planned would not be pursued (T.82).*

After April 27, 1977, the case took on a new dimension, not only because it became evident that the drug sale would not occur but because Elaine's husband, whom Palombo (T.248) and Greenen (T.273, 282-283), among others, had seen on August 14

*Palombo and Agent James Greenen corroborated various parts of Franciosa's account. Palombo either was waiting outside Miss Jones's building, observing Elaine's comings-and-goings and her meeting with a black man later identified as the suspected seller, or he was inside Miss Jones's apartment with Franciosa (see T.247-260). Greenen was engaged in surveillance outside the building and, in addition to seeing the various entrances, exits, and meetings (see T.273-275, 280-285), he followed Elaine to 3528 DeReimer Avenue (T.277). The Government also introduced tapes with transcripts of the Connie/Miss Jones conversation of April 14 (T.219), the Franciosa/Miss Jones conversation of April 18 (T.49-50), the Franciosa/Miss Jones conversation of April 27 (from the hotel) (T.73), and the conversations recorded from the Kel transmitter worn by Agent Palombo on April 27 (T.85).

and/or August 27, was identified by agents from photographs displayed on August 20 and August 27 as Basil Hansen (T.326, 330-331).^{*} On May 3, 1977, about a dozen agents massed at 3528 DeReimer Avenue (T.196), for the evident purpose of capturing Hansen. At about 5:45 p.m., these agents and others entered the house (T. 92-93, 287). Elaine was arrested and a search of her personal effects produced a driver's license in the name Yolanda Williams (T.287) and several leases, including one for 3528 DeReimer Avenue (T.289-290). There was also a search conducted of the entire house (T.93), but it was not until a second search was conducted some six hours later at midnight that a hidden closet was discovered and a quantity of quinine, glassine envelopes, measuring spoons, a scale, and other items were discovered amidst an extensive man's wardrobe (T.193-194, 291-292). Miss Jones was arrested at 2:00 a.m. on May 4, 1977, at her apartment on Washington Avenue by Palombo (T.260).

Miss Jones's defense rested on two facts: the absence of any narcotics and the importance of Basil Hansen. The absence of narcotics supported the defense claim that Miss Jones and Elaine were, at best, involved in a plan to steal \$7,000 from the agents; this was the defense initially advanced in counsel's opening statement (T.22-23). The importance of Basil Hansen became significant when the Government's witnesses and the cor-

^{*}Basil Hansen, a fugitive, had the distinction of being the only unapprehended escapee from the Metropolitan Correctional Center (T.327).

responding 3500 material (see T.326, 330-331, 495-496), as well as defense witness Agent Robert Joura (T.477-478), demonstrated that Hansen had been identified by several agents on April 20, a week before he was observed with Miss Jones on Washington Avenue; counsel contended that the Government's failure to arrest Hansen, a highly sought fugitive, despite opportunities to do so, cast the entire prosecution case into question (T. 485-486).

This appeal concerns the propriety of the court's inclusion in its conspiracy charge of language indicating conspiracy to be a uniquely serious crime which is particularly difficult to detect. The charge in question was requested by the Government and was "accepted in substance" by the court (T.510).^{*} In the pre-charge colloquy,^{**} counsel entered a strong objection to the proposed instructions as "prejudicial and unnecessary" and as "tend[ing] to make the jury feel that the Government has more than they have indicated by the testimony" (T.510). The Government argued that the charge was "perfectly proper" and "appropriate in a case where both defense attorneys in their opening statement commented on the fact that the Government wouldn't produce any narcotics in this case" (T.512). The court reasoned that the instructions would assist the jury in

^{*}The complete text of the court's charge to the jury is reproduced as C to the separate appendix to appellant's brief.

^{**}The complete text of this colloquy is reproduced as D to the separate appendix to the brief for appellant Jones.

understanding the "difficult concept" that there was a separate crime of conspiracy (T.512), and introduced its conspiracy charge with the following instruction:

Now, what is a conspiracy?

A conspiracy is a collective criminal agreement, a partnership in crime. A conspiracy presents a greater potential threat to government and society than acts committed by a lone wrongdoer. Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those of an individual acting alone to accomplish.

Moreover, a group association increases the likelihood that the criminal objective will be successfully realized and renders detection more difficult than in the instance of the lone wrongdoer.

It is because of these and other reasons that Congress has made conspiracy or concerted action to violate the federal law a separate and entirely distinct crime from the substantive crime which may be the objective of the conspiracy.

(T.609-610).

Following a period of deliberations, the jury returned guilty verdicts against both defendants (T.630-631).

Miss Jones appeared for sentence on November 15, 1977. The court, noting that Miss Jones had never previously been arrested, found that she had no prior involvement in heroin trafficking and concluded that her involvement in this crime stemmed from her association with Elaine Hammond (Sentencing at 16). The court imposed a sentence of one year and one day, suspended sentence, and placed Miss Jones on probation for a period of 18 months (Sentencing at 17).

ARGUMENT

IT WAS IMPROPER FOR THE COURT TO INSTRUCT THE JURY THAT CONSPIRACY PRESENTS A GREATER THREAT TO SOCIETY THAN THE CRIME OF AN INDIVIDUAL AND THAT THE ASSOCIATION FACILITATES MORE COMPLEX CRIMES, ENHANCES THE LIKELIHOOD OF SUCCESS, AND MAKES DETECTION MORE DIFFICULT.

The district court introduced the concept of conspiracy to the jurors by charging that conspiracy posed a more substantial risk to the public than did crimes committed by an individual, that conspiratorial agreement facilitated more complex crimes and enhanced the likelihood of criminal success, and that the existence of a conspiracy was difficult to detect. These propositions pertained to no question before the jury, nor were they necessary to an adequate understanding of the conspiracy charges lodged against Miss Jones and her co-defendant. Moreso, these statements were not neutral irrelevancies -- they were inflammatory and highly prejudicial. These statements established a setting for the deliberations in which the jury's duty to assess the facts in a calm and reasoned manner was overshadowed by an appeal to the different obligation to safeguard the community; and, in highlighting the detection difficulties, the court's comments authorized the jury to tolerate deficiencies in the Government's proof as endemic to the prosecution of conspiracy.

These irrelevant and inflammatory instructions have not been adopted by the jury-charge authorities and do not appear

to have been expressly authorized by this Court.* However, they appear to have been subjected to mild criticism. In United States v. Lozaw, 427 F.2d 911, 916-917 (2d Cir. 1970), this Court noted that the defendant had cited two errors in the court's charge: (1) the instruction that conspiracy was sometimes more dangerous than commission of the substantive offense; and (2) the descriptive example of how a conspiracy works. Though this Court did not find prejudicial error on the facts presented and did not squarely meet the issue of the "more dangerous" instruction, it did conclude its discussion: "The exercise of stylistic caution and verbal restraint would have made it unnecessary to consider whether there was a risk that the jury might have been tempted to decide issues

*In those treatises consulted by appellate counsel (e.g., E. Devitt and C. Blackmar, FEDERAL JURY PRACTICE AND INSTRUCTIONS §27.04 (1977); J. Dowsey, CHARGES TO THE JURY AND REQUESTS TO CHARGE IN A CRIMINAL CASE IN NEW YORK 4-11-4-12 (1968); R. Ford and A. Clements, TRIAL JUDGES MANUAL OF CHARGES 184 (1959); W. LaBuy, JURY INSTRUCTIONS IN FEDERAL CRIMINAL CASES §§10.00, 17.02 (1965); W. Mathes and E. Devitt, FEDERAL JURY PRACTICE AND INSTRUCTIONS §§19.07, 25.04 (1965)), nothing resembling the language employed by the district court is approved. Equally, appellate counsel's research has disclosed no federal appellate decision approving this jury charge. The Government, in its requests to charge (Request No. 3), cited as authority for this instruction the charges of four district judges in four district court cases. Of the four cases, two resulted in written decisions by this Court: United States v. Sperling, 506 F.2d 1323 (2d Cir. 1974), cert. denied, 420 U.S. 962 (1975), and United States v. Cirillo, 468 F.2d 1233 (2d Cir. 1972), cert. denied, 410 U.S. 989 (1973), neither of which addresses the propriety of the instruction in question. (In Sperling, this Court upheld Judge Pollack's charge on the matter of single versus multiple conspiracies and found his giving a Pinkerton charge to be non-prejudicial. Sperling, supra, 506 F.2d at 1341-1342. In Cirillo, the Court considered only Judge Weinfeld's cautionary instruction on a point unrelated to that at bar. Cirillo, supra, 468 F.2d at 1240.)

on extraneous standards instead of legal ones." Id., 427 F.2d at 516.

A possible source of the district court's statements is United States v. Rabinowich, 238 U.S. 78, 88 (1915), in which the Supreme Court observed that a distinction between the periods of limitation applicable to a conspiracy and a substantive crime were appropriate in light of the grave character of conspiracy and the difficulty of detection.* The language of Rabinowich was not developed in the context of a jury instruction, and the fact that Rabinowich suggests that the challenged instruction may have been a correct statement of abstract law does not make it a proper jury instruction. See United States v. Linn, 438 F.2d 456, 460 (10th Cir. 1971). In United States v. Hill, 417 F.2d 279, 281 (5th Cir. 1969), the court observed, "It is not the function of the trial judge to instruct the jury on abstract principles of law which have no bearing on the case. Extraneous law may be quite as prejudicial as extraneous facts." (Emphasis in the original.) There, as here, the challenged statements pertained to the

*The Court's exact language was: "For two or more to confederate and combine together to commit or cause to be committed a breach of the criminal laws, is an offense of the gravest character, sometimes quite outweighing, in injury to the public, the mere commission of the contemplated crime. It involves deliberate plotting to subvert the laws, educating and preparing the conspirators to further and habitual criminal practices. And it is characterized by secrecy, rendering it difficult of detection, and adding to the importance of punishing it when discovered." United States v. Rabinowich, supra, 238 U.S. at 88.

jurors' opportunity and obligation to protect their community from criminal conduct, and the court of appeals reversed the conviction.

Even if the instructions in question are not invalid in all instances, their use in this case was inappropriate. This was not a case involving a large body of conspirators -- only two persons were indicted -- and the severe threat to society posed by large conspiracies was not present here. Equally, the criminal goal was not complex, but was the simplest form of drug sale, and the fact that a conspiracy enhances the likelihood of success certainly is not demonstrated by this case, in which a single transaction could not be consummated. Nor was detection a serious problem; numerous agents had all the suspected parties under constant surveillance. The court's comments might be warranted in a case where the defense argues that the crime of conspiracy is less significant than a substantive criminal action. This defense made no such claim; counsel did not argue that the absence of narcotics minimized the importance of the conspiracy, but that this fact supported the defense contention that a drug conspiracy did not exist. Thus, the court's instructions did not serve to clarify the issues of this case; they introduced extraneous concerns bearing no relationship to the questions presented.

The need to make the crime of conspiracy comprehensible to a jury is important, and may require a discussion regarding the realities of conspiratorial agreements. See, e.g., United

States v. Cassino, 467 F.2d 610, 618-619 (2d Cir. 1972), cert. denied, 410 U.S. 928 (1973). But the instructions in question and their actual impact was to the contrary -- the jury's attention was focused on considerations which distorted the evidence of this conspiracy. Having been advised that a conspiracy was a particularly serious crime and that detection was difficult, the jury was led to a position necessarily sympathetic to the Government, and was unable to fulfill its function of unprejudiced fact assessment.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed and a new trial ordered.

Respectfully submitted,

MARTIN ERDMANN, ESQ
THE LEGAL AID SOCIETY,
Attorney for Appellant
MILLICENT JONES
FEDERAL DEFENDER SERVICES UNIT
509 United States Courthouse
Foley Square
New York, New York 10007
(212) 732-2971

STEVEN LLOYD BARRETT,
Of Counsel.

CERTIFICATE OF SERVICE

March 17 , 1978

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Steven Lloyd Bancroft